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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 88.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Appellant,

vs.

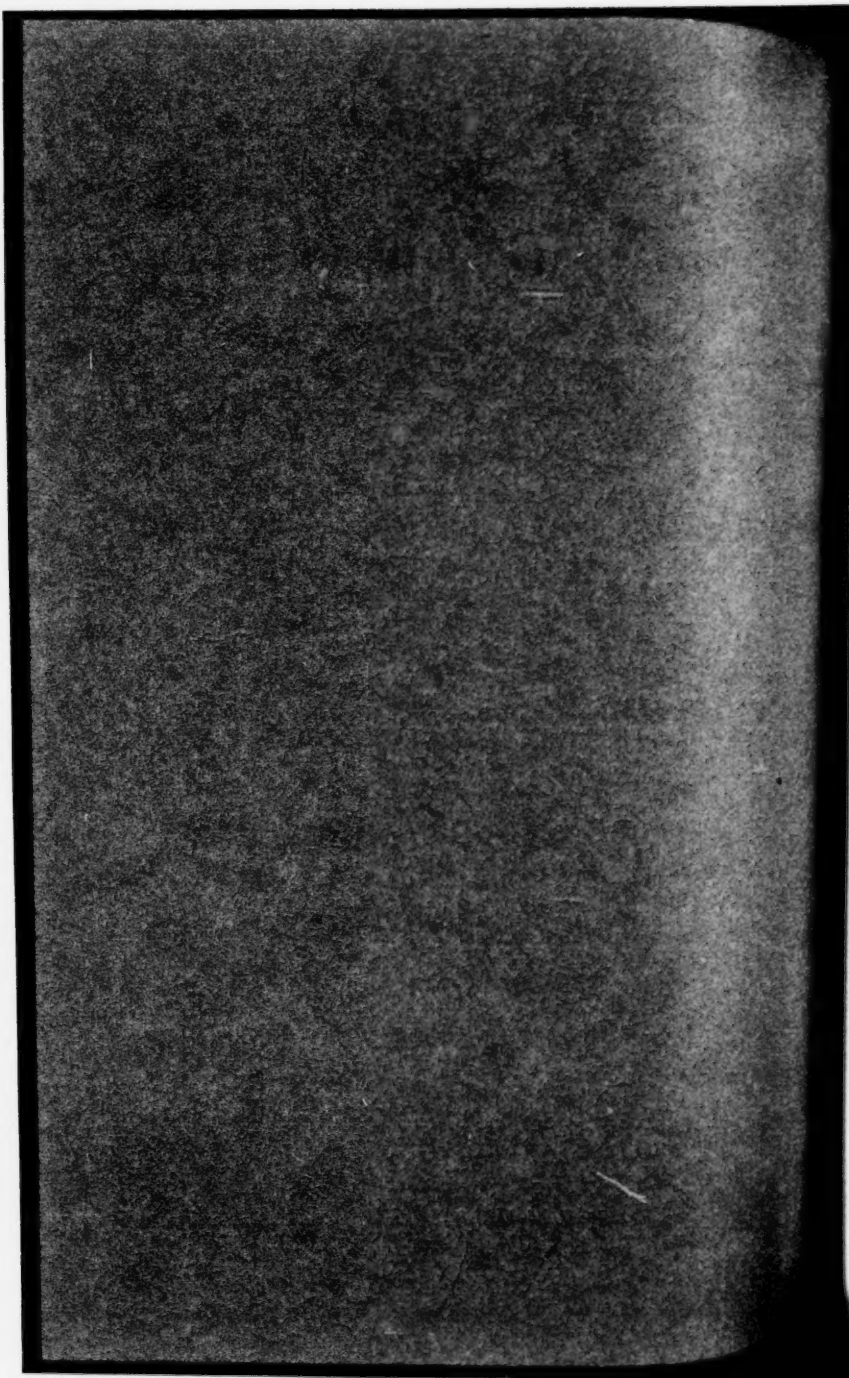
J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL.,

Appellees.

MOTION FOR SUBSTITUTION OF PARTIES.

C. J. ROBERTS,
CHARLES MARKELL,
Counsel for Petitioner.

King Bros., Inc., Printers, 1001 E. Baltimore St., Baltimore, Md.



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MOTION FOR SUBSTITUTION OF PARTIES.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Fidelity and Deposit Company of Maryland, appellant, respectfully shows:

1. Your petitioner, plaintiff below, filed its bill of complaint in the District Court of the United States for the District of New Mexico against the appellees, defendants below, J. M. Luna, Chairman, and Hugh H. Williams and

Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner of New Mexico. The bill was filed January 8, 1924 (R. 1); the final decree April 30, 1924 (R. 15). An appeal to this Court was immediately prayed by your petitioner and allowed by the District Judge April 30, 1924. (R. 17.)

2. On January 1, 1925, the term of office of the appellee, J. M. Luna, as a member of the State Corporation Commission of New Mexico expired, and said appellee was succeeded as a member of the State Corporation Commission of New Mexico by Ed. C. Tafoya, who was duly elected and qualified, ever since has been and now is a member of the State Corporation Commission of New Mexico and then was, ever since has been and now is a citizen of the State of New Mexico and a resident of the State and District of New Mexico. The appellees, Hugh H. Williams and Bonifacio Montoya, and the aforesaid Ed. C. Tafoya, constitute the State Corporation Commission of New Mexico, which has a continuing existence. Section 1 of Article XI of the Constitution of the State of New Mexico provides:

> "A permanent commission to consist of three members is hereby created, which shall be known as the 'State Corporation Commission.'"

Your petitioner is advised that prior to the passage of the Act of Congress of February 13, 1925, entitled "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes," it was, and independently of the provisions of said Act it now is lawful and proper that an order be entered by this Honorable Court substituting as a party to this cause, appellee in this Court, defendant in the Court below, the

aforesaid Ed. C. Tafoya, member of the State Corporation Commission of New Mexico, in lieu of the appellee, J. M. Luna, formerly but no longer a member of the State Corporation Commission of New Mexico. (*Irwin vs. Wright*, 258 U. S. 219, 224-226, and cases there cited.)

3. Chapter 135 of the New Mexico Laws of 1925 entitled "An Act relating to insurance and to codify the insurance laws of the State of New Mexico" was approved March 20, 1925, and took effect from and after its passage and approval (Sec. 77). Section 3 of said act provides, among other things:

> "That all of the powers relating to insurance matters * * * now held by the Bank Examiner * * *, and all records pertaining to insurance now held in the office of the Bank Examiner, be and are transferred to the Corporation Commission, * * *."

Section 2 of said act provides:

> "That a Department of Insurance is hereby created, within the Corporation Commission, the chief officer of which shall be known as the Superintendent of Insurance, and who shall be charged with the execution of the laws relating to insurance."

Section 4 of said act provides:

> "The superintendent shall be appointed and may be removed for cause at any time by the Corporation Commission of the State of New Mexico."

On March 20, 1925, Walter B. Wagner, who then was, ever since has been and now is a citizen of the State of New Mexico and a resident of the State and District of New Mexico, having been duly appointed, duly qualified as Superintendent of Insurance and ever since has been and now is Superintendent of Insurance of New Mexico. As appears from the bill of complaint this cause is a suit brought against the appellee, defendant below, L.

B. Gregg, State Bank Examiner of New Mexico, relating to the present and future discharge of his official duties in respect of the powers relating to insurance matters then held by the Bank Examiner.

4. Section 11 of the aforesaid Act of Congress of February 13, 1925, provides, among other things:

> "Sec. 11. (*a*) That where, during the pendency of an action, suit or other proceeding brought by or against an officer of the United States, * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.
>
> "(*b*) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.
>
> "(*c*) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

5. Your petitioner is advised that the aforesaid Walter B. Wagner, Superintendent of Insurance of New Mexico, is not an indispensable or necessary party to this cause but would be a proper party, that there is

therefore a substantial need for continuing and maintaining this cause against said Walter B. Wagner, Superintendent of Insurance of New Mexico, as the successor in office *pro tanto* of the appellee L. B. Gregg, State Bank Examiner of New Mexico, and obtaining an adjudication of the questions involved, and that by virtue of the provisions of Section 11 of the aforesaid Act of Congress of February 13, 1925, it is lawful and proper that an order he entered by this Honorable Court substituting as a party to this cause, appellee in this Court, defendant in the court below, the aforesaid Walter B. Wagner, Superintendent of Insurance of New Mexico, in lieu of the appellee L. B. Gregg, State Bank Examiner of New Mexico. (See also *Gorham Mfg. Co. vs. Wendell*, 261 U. S. 1, 4.)

WHEREFORE, your petitioner moves this Honorable Court to enter an order substituting as a party to this cause, appellee in this Court, defendant in the court below, the aforesaid Ed. C. Tafoya, a member of the State Corporation Commission of New Mexico, in lieu of the appellee J. M. Luna, formerly but no longer a member of the State Corporation Commission of New Mexico, and also substituting as a party to this cause, appellee in this Court, defendant in the court below, the aforesaid Walter B. Wagner, Superintendent of Insurance of New Mexico, in lieu of the appellee L. B. Gregg, State Bank Examiner of New Mexico.

And as in duty bound your petitioner will ever pray.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Petitioner.

CHAS. MARKELL,

Counsel for Petitioner.

State of Maryland, City of Baltimore, ss.:

I HEREBY CERTIFY that on this 27th day of August, 1925, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Charles R. Miller, President of Fidelity and Deposit Company of Maryland, petitioner in the aforegoing petition, and made oath in due form of law that the matters and facts stated in the aforegoing petition are true as stated, to the best of his knowledge, information and belief.

As witness my hand and notarial seal.

WILLIAM M. REINHARDT,
Notary Public.

(My Commission expires May 2, 1927.)

We hereby admit service of a copy of the aforegoing petition and consent to the passage of an order as prayed.

J. M. LUNA,
Formerly a member of the State Corporation Commission of New Mexico.

ED. C. TAFOYA,
Member of the State Corporation Commission of New Mexico.

L. B. GREGG,
Formerly State Bank Examiner of New Mexico.

WALTER B. WAGNER,
Superintendent of Insurance of New Mexico.

JAMES N. BUJAC,
Assistant Attorney-General of New Mexico, Counsel for Appellees and for Ed. C. Tafoya, a member of the State Corporation Commission of New Mexico, and Walter B. Wagner, Superintendent of Insurance of New Mexico.